Supreme Court, U.S.
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No._____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2001

James W. Virdin, Petitioner

v.

State of Delaware, Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of the
State of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether James W. Virdin's Fourth Amendment right to be free from unreasonable governmental search and seizure does not apply when his mother-in-law's "driving maternal motivation" coupled with the collusive actions of the police, allowing the mother-in-law to break into defendant's home, excuses the police from the Fourth Amendment requirements.

LIST OF THE PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST OF THE PARTIES.....	ii
APPENDIX.....	iv
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	5
CONCLUSION.....	24
APPENDIX.....	25

APPENDIX

Page

James W. Virdin v. State of Delaware, Del. Supr., No. 593, 1999 (September 12, 2001)..... A-1

TABLE OF AUTHORITIES

Cases	Page(s)
Coolidge v. New Hampshire, 403 U.S. 443 (1971)....	20
Illinois v. Rodriguez, 497 U.S. 177 (1990).....	21, 22
Lustig v. United States, 338 U.S. 74 (1949).....	15
Payton v. New York, 445 U.S. 573 (1980).....	15
Schreckloth v. Bustamonte, 412 U.S. 218 (1973).....	15, 20
State v. James W. Virdin, No. 593, 1999 (Del. September 12, 2001).....	1
Stoner v. California, 376 U.S. 48 (1964).....	21
United States v. Matlock, 415 U.S. 164 (1974).....	21
Wong Sun v. U.S., 371 U.S. 47 (1963).....	24

Statutes and Other Authorities	
United States Constitution, Amendment IV.....	1
United States Constitution, Amendment XIV, §1....	1
28 U.S.C. §1257(a).....	1

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2001

James W. Virdin, Petitioner

v.

State of Delaware, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

James Virdin respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Delaware.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware is James W. Virdin v. State of Delaware, No. 593, 1999 (Del. September 12, 2001) and the Delaware Superior Court's denial of Virdin's Motion to Suppress set forth in the trial record.

JURISDICTION

The Delaware Supreme Court entered its judgment on September 12, 2001. (A-1). The Court's jurisdiction rests on 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Article IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 22, 1998, James W. Virdin was arrested on the charges of Murder in the First Degree for intentionally causing the death of Stefanie Ann Virdin and for a Theft Felony of a 1995

Dodge pickup. James W. Virdin was indicted by the Grand Jury in the Superior Court of the State of Delaware in and for Kent County on November 2, 1998.

On September 21, 1999, James W. Virdin went on trial in the Superior Court of the State of Delaware in and for Kent County for the charges of Murder in the First Degree and Theft Felony. On October 4, 1999, James W. Virdin was found guilty for the charges of Murder in the First Degree and Theft Felony.

On October 12, 1999, in the Superior Court in and for Kent County, began the penalty phase of the trial due to the State's request for the death penalty.

On October 15, 1999, the jury returned a verdict in regards to the two questions addressed to them at the penalty phase. As to the first question, which stated: "Does the evidence show beyond a reasonable doubt the existence of the following statutory aggravating circumstance? The victim was pregnant." Yes-12, 0-No. As to the second question which stated: "Does the jury find by preponderance of the evidence after weighing all relevant evidence and aggravation on mitigation which bears upon the particular circumstances, details of the commissions of the defense and the character and propensities of the vendor, that the

aggravated circumstance found to exist outweigh the mitigating circumstances found to exist?" 1-Yes, 11 No.

The Superior Court of the State of Delaware in and for Kent County scheduled the sentencing date of James W. Virdin on December 3, 1999. Based upon the recommendation made by the jury, James W. Virdin was sentenced at supervision Level 5 for the remainder of his natural life without benefit of parole or probation or any other reduction in regards to the charge of Murder in the First Degree. The Court also placed other restrictions on James W. Virdin in regards to the Murder in the First Degree charge and sentenced him to Level 5 for a period of two years on the charge of Theft Felony along with other restrictions set forth by the Court.

On December 14, 1999, James W. Virdin filed a Notice of Appeal to the Supreme Court of the State of Delaware from the Orders and Ruling of the Superior Court of the State of Delaware in and for Kent County which included, but not limited to pre-trial, trial and post-trial rulings of the Honorable Henry DuPont Ridgely from November 2, 1998 to December 3, 1998.

Specifically, the appeal concerned the two searches of Virdin's residence in violation of the Fourth Amendment of the United States Constitution. The Delaware Supreme Court affirmed

the decision of the Delaware Superior Court (A-1). The Delaware Supreme Court held that the search of Virdin's residence on two separate occasions by police was not in violation of the Fourth Amendment of the United States Constitution as a result of their finding that the police action was minimal and incidental police involvement which did not require suppression of any evidence.

REASONS FOR GRANTING THE WRIT

This case is significant because the trial court and the Delaware Supreme Court concluded that a defendant's Fourth Amendment freedoms are trumped by a mother-in-law's driving maternal motivation, while working in collusion with the police during an official investigation of her missing daughter, was sufficient exigency to circumvent the warrant requirement.

This Court should grant Virdin's Petition because the Government's search of his residence on two separate occasions in September of 1998 was in violation of the Fourth Amendment of the United States Constitution and all evidence derived as a result of such searches should have been suppressed.

On September 21, 1998 Tina Yun ("Tina"), the mother of Stefanie Virdin ("Stefanie"), requested that a police officer accompany her to the apartment leased to Stefanie and James

Virdin ("James"). At 9:04 a.m. Officer Timmons ("Timmons") of the Smyrna Police Department met Tina at the Virdins' residence at 33B East Commerce Street in Smyrna. Tina had been given two keys to the Commerce Street apartment by her daughter, Stefanie, sometime in August. Stefanie gave Tina the keys because she "didn't want to be running up and down the stairs after having the baby to unlock two doors to get into her apartment." Both keys were needed to open the outside entry door and one key was used to gain access to the Virdins' apartment. The first time Tina had ever used the keys was on September 21, 1998.

Timmons stated that he was there to make sure there was no problem between Tina and James although there was no indication that Tina was in fear of James. Timmons indicated that he did not believe James was a perpetrator of domestic violence at the time he responded to the Virdins' apartment.

Tina used the two keys to gain access to the Virdins' apartment and allow Timmons and herself access to the apartment. Timmons did not ask Tina how or when she obtained the keys to the Virdins' apartment. Timmons did not ask Tina if she lived at the apartment, nor did he ask if Stefanie or James knew that she

had possession of the key to the apartment. Timmons never had Tina sign a consent to search form.

Timmons announced his presence and identity inside the apartment. Both Tina and Timmons proceeded to search the apartment for James and/or Stefanie. Timmons immediately noticed how "very neat" and "immaculate" the apartment was and that there were no signs that any fight or tussle had taken place in the apartment.

Timmons proceeded to check the bathroom in the apartment to make sure nobody was in there. He then used a penknife to "jimmy" the lock on the Virdins' bedroom door to search it. Timmons again noted how "very neat" and "very clean" the bedroom was kept.

Timmons and Tina spent about ten minutes searching the apartment. Before Timmons left the apartment, he placed a business card on the coffee table in the living room with his handwritten name and request for the Virdins' to contact him "immediately". Outside the apartment, Tina gave Timmons details about James and Stefanie and James' drug use. Timmons went back to the Smyrna Police station and notified the Smyrna

Police Department and Kent.com to be on the lookout for Stefanie and the Virdins' Dodge Durango.

Later that afternoon, Timmons learned from Patrolman Bowser ("Bowser") of the Smyrna Police Department that a Dodge pickup truck ("pickup"), recently traded in by James, was stolen from Brandywine Chrysler Plymouth ("BCP"). Timmons stated "In my mind I have a stolen vehicle that close to 33 East Commerce Street, was owned by James Virdin, we are now looking for his wife and the Durango. He may have taken it at that point." Timmons then upgraded the general bulletin to be on the lookout for the stolen pickup and for James as a possible suspect. The broadcast for the stolen pickup truck took place between 3:30 p.m. and 4:00 p.m. that afternoon.

That same day, Timmons proceeded to drive around looking for the Virdins' Durango. Timmons also went to BCP to obtain the temporary tag number of the Virdins' Durango so he could broadcast the information in a general bulletin.

Timmons returned to the Virdins' apartment "all day long" to knock on the apartment door. Timmons proceeded to make 10 to 12 telephone calls to the Virdins' family members in an attempt to locate either James or Stefanie. Timmons also obtained Tina's

car phone number and contacted her and was contacted by her several times that day to discuss the investigation. During one call, Timmons told Tina that he would get some information from her so he could get a search warrant for the apartment. Timmons advised Tina that Corporal Graham ("Graham") should accompany Tina and her husband, Michael Yun ("Michael"), to the Virdins' apartment if they wished to return later that day. Timmons asked Graham to stop by the Virdins' apartment and knock on the door and check if anyone answered if Tina didn't contact the Smyrna Police Department that night.

Timmons also left two telephone messages at the Virdins' residence, one around 11:00 a.m., one around 7:50 p.m., as part of his investigation. One phone message advised James that Stefanie was considered a missing person. Timmons also advised the Virdins' to contact him or Graham that day.

Also that day, Timmons briefed Chief Baldwin ("Baldwin") on the fact that the Smyrna Police Department had a missing person on Stefanie. Timmons also told Baldwin that he believed that James was a suspect in the theft of the pickup from BCP. That afternoon, Baldwin went to the Virdins' apartment

and spoke with John Naylor, a neighbor, who told Baldwin that James had lent out the Durango for drugs.

A complaint number was assigned and the missing persons report ("MPR") was filed at 5:27 p.m. on September 21. Timmons stated that, typically, MPR's are filed after 24 hours, but circumstances prompted him to file sooner. All bulletins were broadcast by the time the MPR was filed. Timmons wrote a supplemental report on the theft of the pickup and wrote, "Defendant Virdin is also under investigation for homicide"; the word "homicide" was subsequently scratched out by someone other than Timmons and the words "unrelated offense" were written in its stead.

At around 8:05 p.m. the same day, Tina and Michael ("The Yun's") met Graham at the Virdins' apartment. At the time Graham entered the apartment he was aware that Timmons had filed the MPR concerning Stefanie. Graham also knew that Timmons had searched the apartment earlier that day. Timmons told Graham that he had gone to the Virdins' apartment several times that day. Graham was also aware that the pickup had been stolen from BCP at that time. Timmons told Graham to respond to the Virdins' apartment as a public assist, just as he had done earlier

that day. Graham knew that The Yun's wouldn't return to the apartment without an officer present.

After about a minute, Graham and The Yun's "formulated a plan that they would use [The Yun's] key to gain entrance" to the apartment. Graham never questioned Tina about her authority to have the key. Graham entered the apartment first. Graham didn't recall knocking first, but he recalled calling out Stefanie's name. Graham recalled how "very well kept" and "very, very neat" the apartment was.

Graham stated that his objective was to search for Stefanie at the time he entered the apartment. However, Baldwin stated, and the court found that, after Timmons left, no one in the Smyrna Police Department believed Stefanie was in the apartment.

Graham stated that he and The Yun's were checking the whole apartment that evening. Graham and The Yun's first searched the downstairs including the living room, kitchen, the baby's room and the closet. During the search Graham was talking with The Yun's. Graham was first up the stairs to the second floor of the apartment. Graham proceeded to check the bathroom, which he noticed was well-kept.

Graham came upon the locked bedroom door and told The Yun's that he "had no way to open it" and was aware that no one had a key to the bedroom door. Graham stood by and watched as Michael then "jimmied" the lock as Graham stood over Michael's left shoulder. Graham never told Michael that he couldn't open the door. Graham noticed a "slight smell" when the door was opened, but it was nothing that alerted him to the presence of a dead body in the bedroom. Graham noticed the bedroom was neat and in order. Graham proceeded to check one part of the bedroom while The Yun's searched another part. Shortly thereafter, Stefanie's body was discovered. Graham then ordered The Yun's out of the bedroom.

Officer Fortner ("Fortner"), of the Criminal Investigations Unit of the Smyrna Police Department, responded to the Virdins' apartment around 8:15 p.m., after the body of Stefanie had been found. Fortner was aware of the investigation involving Stefanie when he arrived at the scene. Fortner was informed about the stolen pickup when he arrived at the scene.

Corporal Scott ("Scott") of the Dover City Police Department was patrolling the City of Dover at 7:00 p.m. on September 21, 1998. At some point, after 7:00 p.m., Scott

received a general broadcast that James was a murder suspect and might be in the Dover area in the known drug area of Manchester Square. About one-half to one hour after receiving the general broadcast, Scott was asked to call the dispatch center to receive additional information. Scott was given a general description of James, was told that he was a suspect in the theft of the pickup from BCP, was given tag numbers for both the pickup and the Durango, and he was asked to specifically check the Manchester Square area for James.

At around 9:00 p.m., Scott saw a red pickup with a white operator and he believed it might be James. Scott followed the truck and learned, from calling in the tag number, that it was the pickup stolen from BCP. Shortly thereafter, James pulled over in a parking lot off Route 13 in Dover. James identified himself as "Jimmy Virdin" when asked by Scott.

James was placed under arrest by Scott at 9:17 p.m., but was not told the reason. James seemed very dejected at the time of his arrest. James was then taken to the Dover City Police Department. A statement was taken by police from James in which he explained the circumstances that led to the death of Stefanie.

The police flagrantly violated Virdin's rights by conducting two illegal searches and used the knowledge of the illegally obtained evidence in order to elicit evidence from Virdin. Therefore, all evidence obtained as a result of such illegal searches should have been suppressed since the taint of the initial violations were so great that the State is unable to overcome it and, consequently, the newly discovered fruits are inadmissible under the "fruit of the poisonous tree" doctrine.

In Schreckloth v. Bustamonte, this Court stated "it is well settled under the Fourth and Fourteenth Amendments, that a search conducted without a warrant issued upon probable cause is per se unreasonable... subject only to few specifically established and well-delineated exceptions". 412 U.S. 218, 219 (1973) (citations omitted). This Court has also declared that "searches and seizures inside a home are presumptively unreasonable" and against the basic principle of the Fourth Amendment Payton v. New York, 445 U.S. 573, 586 (1980).

Based upon the facts as submitted above, the two police officers conducted a search under the Fourth Amendment Lustig v. United States, 338 U.S. 74 (1949). Although the lower courts labeled the conduct of the police as minimal and incidental police

involvement, the facts establish that the police did more than witness two private searches.

Timmons was aware that Tina did not live at 33B East Commerce Street before they entered the apartment. In fact, he knew that Tina was looking for her daughter who she hadn't spoken to for a couple of days. Timmons, knowing that Tina didn't live there, should have limited his "public assistance" to ascertaining whether either of the rightful occupants (James or Stefanie) were in fact in the apartment. That is, they should have merely knocked on the door and waited for a response. Because it was clear that Timmons had no authority to use the key personally, he exceeded the "public assist" function of his duties by becoming an efficient actor with Tina and began a search without a warrant when he entered the apartment.

Assuming it was proper for Timmons and Tina to use the key to open the door to the apartment, Timmons should have only announced his presence and reason for being at the apartment in an attempt to elicit some response from a possible occupant. Instead, Timmons clearly exceeded the scope of the "public assist" function of the police by proceeding to go room to room and opening doors and closets in trying to locate either James or Stefanie.

Assuming it was proper to look around the apartment as a "witness" to private search, Timmons again exceeded the scope of the "public assist" by "jimmying" the lock on the bedroom door. At this point, Tina did not enter the bedroom with Timmons, because she had gone downstairs to answer the telephone. Therefore, Timmons was no longer "witnessing" a private search, but was actively pursuing his own search of the apartment.

Assuming Timmons was merely "witnessing" a private search of the locked bedroom when he personally "jimmied" the door and walked in unaccompanied by Tina, Timmons again exceeded the scope of the "public assist" by "witnessing" a search of an area where it was clear that Tina had no authority to search. That is, Tina possessed a key to the front door, but had no key to the locked bedroom. If either James or Stefanie had in fact given Tina the authority to enter their apartment for some purpose, it cannot be inferred that the authority extended to any room in which access was reasonably restricted. Therefore, Timmons' search of the bedroom was illegal.

Since Timmons had done more than "witness" a private search by the time he entered the locked bedroom, it is reasonable to infer that his purpose at the apartment was no longer "public

assistance" but was to gather information that would be relevant in a criminal prosecution.

Timmons was not "witnessing" a private search when he placed a business card on the living room coffee table with a handwritten message for James or Stefanie to call him immediately. Likewise, when Tina went to pick up the card, Timmons told her not to take the card because he wanted James or Stefanie to see it on the table.

Assuming that the search "witnessed" by Timmons was not for the purpose of gathering information that would be relevant in a criminal prosecution, Timmons began a criminal investigation immediately following the search and, therefore, the search conducted by Graham was illegal.

After the search, Timmons began an investigation to locate a missing person. He put out a general bulletin to be on the lookout for Stefanie and the Durango. He was contacted by Bowser and was informed that a pickup was stolen from BCP. He learned that James was the previous owner of the pickup and he immediately linked the two investigations together. Timmons suspected James as a suspect in the theft, and, after getting information from BCP, upgraded the GB to look for James and the

stolen pickup. Timmons continued to search for Stefanie and James by patrolling the area and making numerous stops at their apartment. He also maintained contact throughout the day with The Yun's and told Tina that he would contact her later to get more information to obtain search warrant.

Timmons told Tina to contact Graham before going back to the Virdins' apartment, so that Graham could accompany The Yun's inside the apartment. Timmons briefed Baldwin on his investigation, which prompted Baldwin to go to the apartment and speak with a neighbor. Timmons also briefed Graham on his investigation before The Yun's contacted Graham. Timmons finally made a missing person report at 5:27 p.m., which was before the normal 24-hour waiting period had expired.

Therefore, when Graham conducted the second search at 8:05 p.m. where he stood idly by and allowed Michael to "jimmy" the locked bedroom door, he was actually continuing the investigation that Timmons had already begun earlier in the day. And, since James was already named a suspect in a criminal investigation, and the Court should find that the purpose of the search was to gather information relevant to a criminal prosecution.

Graham stated that his purpose and objective in conducting the search was to look for Stefanie. However, Baldwin stated that after his conversation with Timmons, he stated that no one in the Smyrna Police Department believed that Stefanie was in the apartment. It is therefore reasonable to infer from the facts that the objective of the search was to gather information relevant to a criminal prosecution against James.

The facts stated above also establish that The Yun's were agents of the State when the searches occurred. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The resolution of whether an individual becomes such an agent of the police is determined by the totality of the circumstances . (Id) The holding in Coolidge and other related cases prevent police from circumventing the Fourth Amendment by having a private individual conduct a search that would be unlawful if performed by the police themselves. The totality of the circumstances surrounding the searches at the Virdins' residence indicate that The Yun's were acting as agents of the police and, therefore, their conduct is subject to scrutiny under the Fourth Amendment.

The police may conduct a warrantless search if consent is voluntarily given by the person whose property is being searched.

Schreckloth v. Bustamonte 412 U.S. 218 (1973). Nothing in the record shows that either of the Virdins consented to the search of their apartment.

The police may not conduct a warrantless search of a person's residence unless consent is given by a person who has "actual authority" to do so. See Stoner v. California, 376 U.S. 483 (1964). In United States v. Matlock, this Court stated that consent by a third party is valid as against another who shares "common authority" over the property being searched. See United States v. Matlock, 415 U.S. 164, 170 (1974). The Court further stated that:

> The authority which justifies the third party consent ... [rests on] mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched. Id. at 171 n.7 (1974).

In Illinois v. Rodriguez, 497 U.S. 177, 181 (1990), the Court found that the defendant Rodriguez's girlfriend did not have the "actual authority" to consent to a search of defendant's apartment. The Court did not find the girlfriend to have common authority over the premises even though she possessed a key to the apartment, she had some possessions in the apartment, and she had

previously lived there for several months. See Id. at 182. The Court explained that the girlfriend did not have authority to consent to a search of the apartment because her name was not on the lease, she did not pay rent, she did not currently reside at the apartment, she did not go to the apartment when her boyfriend was not present, and she did not invite guests to the apartment without defendant's permission. See Id.

In Rodriguez, the Court declared that although "apparent authority" can satisfy the consent requirement, it also stated that: what we hold today does not suggest that law enforcement officers may always accept a person's invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the *surrounding circumstances* could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. Illinois v. Rodriguez at 188 (emphasis added).

The Court stated that third party's consent is invalid if the situation presents any ambiguities, unless it is discovered that the third party has "actual authority" to consent. Id.

Even if Tina and Michael had some limited authority to enter the apartment, the scope of the authority would be derived

from the statement that Stefanie told her mother to use the keys when Stefanie was at home, after she had the baby, and was otherwise unable or unwilling to climb the stairs to open the doors to her apartment. Based on the limited scope of authority given to Tina, one cannot infer that Stefanie had given The Yun's the authority to use the keys when James and Stefanie were not at home. Additionally, the key was given to Tina with a condition precedent to its use, i.e. birth of a baby.

In addition, their control over the locked bedroom was clearly limited because they could not gain access to the bedroom. If The Yun's in fact had any authority to consent to search, it cannot be inferred that The Yun's had the authority to "jimmy" the lock to James and Stefanie's bedroom door in order to gain access inside the room. The scope of authority would lie where The Yun's had reasonable access inside the apartment. The limited authority, if any, cannot be deemed a general authority to consent to a police search of the entire apartment.

During the first search, Timmons came upon a locked door to the master bedroom. At this point, whether or not consent to enter the apartment was valid, the officer should have recognized how the situation had suddenly changed. Since Tina only had keys

to the front doors of the apartment, the authority to continue the search should have been questioned by Timmons. Instead, Timmons proceeded to "jimmy" the lock himself and search the bedroom. Timmons clearly exceeded the scope of authority, if any, that Tina had to consent to a search inside the apartment.

A similar situation occurred again during the second search. Graham conducted a room by room search accompanied by The Yun's. Eventually Graham came upon the locked bedroom door. He told The Yun's that he had no way of opening the door. However, he never stopped to think about why the door was locked in the first place. Instead, he allowed Michael to "jimmy" the lock and then continued the search. Graham should have recognized how the situation had changed from that of ambiguity (which should have prompted further inquiry anyway) to that of a clear-cut case where none of the three searchers had reasonable access to the locked bedroom.

Since the initial police searches and seizures conducted at Virdins' residence violated Virdin's Constitutional Rights, the State should have been prohibited from using evidence that was derived from the fruits of the illegal searches. Wong Sun v. U.S., 371 U.S. 471, 485 (1963).

CONCLUSION

For all the foregoing reasons, James Virdin respectfully requests the granting of his petition for writ of certiorari.

Date: December 10, 2001

JAMES E. LIGUORI
LAURA A. REDDING
Attorneys for Petitioner

APPENDIX

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES W. VIRDIN	§	No. 593, 1999
	§	
Defendant Below,	§	Court Below: Superior Court
Appellant,	§	of the State of Delaware in
	§	and for Kent County
v.	§	
	§	IK98-10-0088 and 0089
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: July 19, 2001
Decided: September 12, 2001

Before **VEASEY**, Chief Justice, **WALSH**, **HOLLAND**, **BERGER** and **STEELE**, Justices, constituting the Court *en Banc*.

Upon Appeal from Superior Court. **AFFIRMED**.

James E. Liguori, Esquire (argued) and Laura A. Redding, Esquire of Liguori, Morris & Redding, Dover, Delaware, Attorneys for Appellant.

John Williams, Esquire, Department of Justice, Dover, Delaware, Attorney for Appellee.

VEASEY, Chief Justice

This appeal of a life sentence without probation or parole entered on a first degree murder conviction presents several issues, two of which are of particular importance in our jurisprudence.

One issue is the question of when a search by private parties becomes a police search, thus invoking the constitutional protections against unreasonable searches and seizures by state agents. In this case we agree with the trial court's determination that the search was primarily instigated and conducted by the victim's mother (albeit with police assisting) of her missing daughter who was nine-months pregnant. Thus, it was a private search by a concerned parent looking for her missing daughter, not a search where the mother was an agent of the State.

On the second issue, we hold that the failure of the trial court to give instructions on the lesser included offenses of manslaughter and criminally negligent homicide was not reversible error. Here, the jury was instructed on both first degree and second degree murder. The jury opted for a first degree murder conviction, thus rejecting the second degree option.

This renders moot or harmless the failure of the trial judge to instruct on other offenses that were of a lesser severity than second degree murder, even assuming (without deciding) that there was a rational basis in this record for those lesser included offenses.

We find that the additional assignments of error are without merit. Accordingly, we affirm the judgment of the Superior Court.

Facts

The victim in this case is Stefanie Virdin, who was the wife of James W. Virdin at the time of Stefanie's murder for which Virdin was ultimately convicted and sentenced.[1] In September 1999 Stefanie was carrying a full-term fetus and was due to give birth on Monday, September 21. Early that Monday morning, Stefanie's mother, Tina Yun, was alarmed because she had not seen or spoken with her daughter since Saturday afternoon.[2] Mrs. Yun had spent all day Sunday trying to locate her daughter. She testified (hyperbolically) that she had called the Virdins' apartment "30,000 times from Sunday morning until [Sunday night.]" Also, she said she "was out riding the roads looking at all hospitals. I called Beebe hospital.

I called Christian hospital. I called Kent General Hospital. I rode through Kent General Hospital parking lot about three or four times." Therefore, when she woke up early on Monday morning, she decided to drive over to the Virdins' apartment to look for Stefanie. Arriving at approximately 8 a.m., Mrs. Yun entered through the front door using keys that Stefanie had given her.[3]

Inside the apartment, Mrs. Yun encountered Virdin but not Stefanie. She asked Virdin where Stefanie was, saying, as she recalled in her testimony, "Where is Stefanie? I've been calling 30,000 times from Sunday morning [and] I had no answer." Virdin told Mrs. Yun that Stefanie had spent the night with certain relatives. Mrs. Yun left the apartment. Using her car phone, she learned that Stefanie had not, in fact, spent the night with these relatives and that they did not know where Stefanie was. She made calls to other relatives but none of them had seen Stefanie.

Mrs. Yun decided that she wanted to go back to the apartment, but that she wanted the police to accompany her because she was frightened.

She drove to a police station, arriving there at approximately 9:00 a.m. At first, it appeared that no officers were immediately available, but Mrs. Yun testified that she "was pretty pushy about getting an officer to go with me," telling an officer on duty, Sergeant Timmons, "It can't wait." She testified that she was "visibly upset" and "crying". Sergeant Timmons agreed to accompany her to the Virdins' apartment, following her there in his police car.[4] On the drive over, she left a message on Virdin's machine warning him that she was arriving with a police officer and that he should dispose of any drugs he was keeping.

Mrs. Yun and Sergeant Timmons arrived at the apartment and entered using Mrs. Yun's keys. Virdin was not there. They each proceeded to check through different areas of the apartment. Timmons came upon the bedroom door, finding it locked. Through the locked door Timmons could hear the air conditioner running inside the bedroom. With Mrs. Yun standing behind him, he jimmied open the door with a penknife, and took a quick look inside the bedroom to verify that no one was there. Seeing nothing amiss, he left the bedroom, leaving the door unlocked. According to Timmons, the whole apartment was very neat and clean.

This search took about ten minutes, after which Timmons and Mrs. Yun left the apartment - Timmons leaving his business card on a coffee table with a written request to Virdin to call him immediately.

Later in the afternoon, Sergeant Timmons learned that a Dodge pickup truck recently traded in by Virdin had been stolen from the lot of a car dealership. At approximately 3:30 p.m., he put out a general bulletin to be on the lookout for the stolen truck and for Virdin as a suspect in the theft. Timmons also broadcast the tag number of Virdin's Dodge Durango (a separate care the existence of which he had learned of through Mrs. Yun) in an attempt to locate the Durango and Stefanie. Throughout the day, Timmons made additional stops at the apartment to knock on the door. Using phone numbers given to him by Mrs. Yun, he also called various family members and left messages on Virdin's answering machine. As the afternoon wore on, concern grew over Stefanie's absence. Timmons briefed others in the department on the situation. A missing person report was filed at approximately 5:30 on Monday evening.

In a phone conversation at some point in the afternoon, Mrs. Yun told Timmons that she and her husband, Mike Yun, wanted to check the apartment again. Timmons advised her that before returning she should contact Corporal Graham, who was scheduled to relieve Timmons, so that Graham could accompany the Yuns to the apartment in order to avoid any "problems". Timmons thus informed Graham that the Yuns "may stop by the department to have an officer respond to Mrs. Virdin's apartment," and briefed Graham on the general situation, including Timmons' own efforts throughout the day. When the Yuns called the station to state that they wished to return to the apartment, Graham arranged to meet them there.

At approximately 8:00 on Monday evening, Corporal Graham and the Yuns entered the apartment, using, as before, Mrs. Yun's key. The Yuns and Corporal Graham each looked in various rooms of the apartment. Again, everything was neat and apparently in order. Reaching the bedroom door, Graham saw that it was locked,[5] and informed the Yuns that he could not open it. Mike Yun jimmied the door open with Corporal Graham standing behind him.

The Yuns entered the room and walked to the right side of the bed. Mike Yun smelled a "terrible stench" as he entered the room. Corporal Graham walked into the bedroom and proceeded to check a closet in the left side of the bed. Stefanie's body was lying on the ground on the right side of the bed, partially obscured by pillows. Tina Yun saw the body and screamed. Corporal Graham took the Yuns out of the bedroom, and then returned inside. Looking at the body, he had "no doubt" that Stefanie was dead. Virdin became a suspect in his wife's homicide.

About an hour later, the police found Virdin driving a stolen truck. Virdin was brought to the Dover Police Department. Virdin waived his *Miranda* rights and gave an audiotaped and videotaped interview in which he confesses to the murder.[6]

According to Virdin, on Saturday morning he and Stefanie were in the bedroom arguing about Virdin's drug habit and the money it consumed. There was some pushing and shoving between the two of them. Virdin "lost all control" and the two of them ended up on the floor beside the bed.

Virdin sat on Stefanie (apparently with his knees on her), who was lying on her back, and choked her to death. [7] Virdin then covered her up with pillows and left the apartment in search of drugs. Virdin also confessed to having a stolen the pickup truck using a spare key he had retained. Search warrants for the apartment and both of Virdin's vehicles were obtained and executed in the early morning hours of September 22, 1998.

Virdin raises four issues on appeal. He contends that: (1) the Superior Court erred by denying his motion to suppress evidence obtained as a result of a search he claims was illegal; (2) the Superior Court abused its discretion by finding that Virdin's waiver of his *Miranda* rights was voluntary, consequently denying his motion to suppress his statement to the police; (3) the Superior Court erred by denying his request for a jury instruction on the lesser included offenses of manslaughter and criminal negligence; and (4) the Superior Court abused its discretion by admitting into evidence a photograph and certain diagrams depicting, respectively, the pregnant victim's naked corpse and the size and position of a full-term fetus.

Search Issue

Virdin moved to suppress the evidence of the body itself and other evidence obtained as a result of the search of the apartment, contending that the police searched his home without a warrant and without alternative justification for a warrantless search under the Federal or Delaware Constitutions.[8] The trial court denied the motion, relying on the principle that state and federal constitutional guarantees against unreasonable searches apply only to searches conducted by the State. The trial court found that in this case the search was a private search conducted by the Yuns, who would have searched the apartment whether the police were present or not. Therefore, the trial court found that the discovery of Stefanie's body by the Yuns was not imputable to the police. Virdin argues that (1) the Yuns were state agents because their search was part of an ongoing investigation; and (2) in any event the active role played by Timmons and Graham exceeded the bounds of any initially private search.

The Superior Court's denial of a pretrial motion to suppress after an evidentiary hearing is reviewed on appeal for an abuse of discretion.[9]

The formulation and application of legal concepts to undisputed facts is reviewed de novo.[10] "To the extent the trial court's legal decision is based on its own factual findings, and to determine whether those findings were the result of a logical and orderly deductive process."[11]

A search or seizure conducted by a private party does not implicate the Fourth Amendment.[12] Evidence discovered as a result of such a search is not subject to the exclusionary rule, which is aimed at deterring "official misconduct".[13] When a private party conducts a search as an "instrument or agent" of the government, however, the Fourth Amendment[14] and the Article 1, § 6 of the Delaware Constitution apply. "The government may not do, through a private individual, that which it is otherwise forbidden to do."[15] In addition, apart from the agency analysis, the level of the police participation in an initially private search may transform that search into a governmental search, raising a separate issue focusing on actions of the police rather than the Yuns.[16]

We now address the issue whether the searches in this case were private searches.

First, we address whether the Yuns were state agents. We find that the following legal framework is helpful:

> [T]wo critical factors in the instrument or agent analysis are whether the government knew of and acquiesced in the intrusive conduct and whether the private party's purpose in conducting the search was to assist law enforcement agents or to further [its] own ends. Other useful criteria are whether the private actor acted at the request of the government and whether the government offered the private actor a reward.[17]

The analysis is a highly factual one that must take into account the totality of the circumstances.[18] The defendant bears the burden of proving that the private party was acting as an instrument or agent of the government.[19]

We conclude that the trial court's determination that the Yuns were not acting as state agents finds substantial support in the record. The Superior Court found that "Mrs. Yun had a driving maternal motivation independent of any governmental action to find her missing daughter who was due to deliver a baby on September 21, 1998."[20]

Mrs. Yun was understandably alarmed at her daughter's unexplained absence on the days before she was to give birth.

In the two days leading up the discovery of the body, she engaged in frantic efforts to locate her daughter, including driving to area hospitals, calling various people who might have seen Stefanie, and visiting the apartment by herself early on Monday morning. Her decision to go back to the apartment with Sergeant Timmons, and later with Corporal Graham (together with her husband, Mike Yun), was motivated by an urgent concern for her daughter's safety, and was not related to assisting with a police investigation.[21] The record reflects that the Yuns requested that the police accompany them because of concern about a confrontation with the defendant.[22] We agree with the Superior Court that in bringing police officers to the Virdins' apartment and searching that apartment the Yuns were not acting as agents of the State.[23]

As indicated above, the level of police involvement in the searches is also an issue in this case. Virdin points out that Timmons searched through some rooms himself and jimmied open the locked bedroom door. Before leaving the apartment, he left his business card with a request that Virdin contact him. Graham took similar initiative in searching through parts of the apartment himself.

Virdin argues that these activities are not consistent with a private search, and were undertaken to gather information rather than to assist the Yuns with their search for their daughter.

The trial court ruled that "the role of the police on the facts of this case did not transform the search by the Yuns into a search by the government."[24] Relatedly, the trial court found that "the police presence in each instance before the discovery of the body, was not for any investigative purpose but only at the request of Mrs. Yun to keep the peace should there be a confrontation with the defendant." The trial court referred to the officers as having "witnessed" the private search.[25]

The trial court's conclusions do not entirely address the issues whether Timmons and Graham were engaged in a search of the apartment. Although their *presence* was for the Yun's safety, it is not clear on this record whether this also provides that rationale for their decision to look through the apartment.[26] It is not entirely accurate to say that they merely "witnessed" a search by the Yuns. Each officer looked through the apartment on his own. Graham, for instance, looked into the bathroom, and, once in the bedroom, went to check a closet.

Timmons walked through rooms alone and unlocked the bedroom door in order to look inside that room. Viewed in the abstract, to the extent they were not motivated by the need to protect the Yuns, these are searches. Private initiation of a search does not serve as a "Trojan horse" for investigation that goes beyond the scope of private search.[28]

Nevertheless, we are not required in this case to determine exactly which police activity was in the service of the Yuns and which police activity crossed the into a search of that apartment for other purposes that could trigger constitutional protections. Assuming *arguendo* that Timmons and Graham engaged in illegal searches, such searches yielded no evidence to suppress.

Timmons found no evidence during his visit to the apartment and did not uncover anything leading to a later discovery of evidence. The only evidence obtained during the Graham search was the victim's body. Mike Yun, not Graham, jimmied open the bedroom door.[29] It was the Yuns who found the body. Thus the discovery of the body is simply not imputable to Graham even if Graham should have refrained from searching other parts of the apartment.

As the trial court found, the Yuns were present on their own initiative and would have been there without Graham. Thus, Graham's presence and actions were only incidental to the evidence Virdin seeks to suppress. We conclude on this record that the minimal and incidental police involvement doses not establish a violation of the Fourth Amendment or Article I, 6 of the Delaware Constitution that would require suppression of any evidence.[30]

Miranda Issue

Virdin was picked up by the police shortly after becoming a murder suspect and was interviewed by two detectives at the Dover Police Department. At the outset, Virdin was read his Miranda rights, which he then waived, agreeing to talk to the police. Virdin argues that his statement to the police should be suppressed because he was under the influence of drugs when he waived his Miranda rights, having taken cocaine in the day. The trail court found that Virdin's waiver was valid because "notwithstanding the Defendant's admission to the use of cocaine earlier in the day, he had the capacity to understand the questions

asked and to know what he was saying at the time of his statements to the police."[31] Consequently, the trial court denied the motion to suppress.

The issue on appeal is whether the Superior Court's denial of Virdin's pretrial motion to suppress his statement, made after an evidentiary hearing, was an abuse of discretion.[32] To be effective, the waiver by a suspect in a criminal investigation of the suspect's Miranda rights must be knowing, voluntary, and intelligent.[33] The burden is on the State to show the validity of the waiver.[34]

We conclude that the trial court did not abuse its discretion when it admitted Virdin's statement into evidence notwithstanding evidence of Virdin's drug intoxication. We have held that although intoxication may make a waiver invalid," intoxication does not per se invalidate an other otherwise proper waiver of rights."[35] In his statement to the police Virdin stated that he was " a little bit" under the influence of drugs. He stated

that he had taken cocaine at 11 a.m. in the morning, approximately 11 hours before giving the statement. The statement reflects that Virdin had sufficient capacity to" know what he was saying and to have voluntarily intended to say it."[36]

He gave a detailed and coherent account of the murder.[37] On this record, there is no basis to conclude that the Superior Court erred in finding that the waiver was constitutionally valid and admitting the statement into evidence.

Jury Instruction

At a prayer conference regarding jury instructions, the State took the position that the jury should be instructed only on the offense of first-degree murder. Virdin requested instructions on the lesser-included offenses to first-degree murder of second-degree murder, manslaughter, and criminal negligence. The trial court instructed the jury on first and second-degree murder, but denied Virdin's request for instructions on manslaughter and criminal negligence. Virdin alleges on appeal that it was error not to give those instructions.

Under 11 Del. C. §206 (c), the trail court "is not obligated to charge the jury with respect to a lesser included offences unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[38]

We need not decide whether there is a rational basis for the lesser included offense instructions sought by Virdin. As noted, the trial court agreed with Virdin that, based on Virdin's confession and expert testimony regarding the cause of death,[39] a jury could find that Virdin did not intend to kill Stefanie. Accordingly, the jury was instructed that it could acquit Virdin of first-degree murder but find him guilty of second-degree murder.

What differentiates second-degree murder and manslaughter, however, is whether the reckless act resulting in death was committed "under circumstances which manifest a cruel, wicked and depraved indifference to human life."[40] The "distinction is one of degree only."[41] In many, perhaps most cases, whether a reckless act rises to the level of second-degree murder is a determination for the jury to make.

In this tragic case, however, the undisputed evidence was that Virdin intentionally sat on top of and began to choke with his hands his wife who was nine-months pregnant. These actions manifest "a cruel, wicked, and depraved indifference to human life."

Because the jury opted for a first-degree murder conviction, we need not decide whether there was a rational basis on this record for the jury to conclude that Virdin's acts could have been reckless without manifesting the other elements of second-degree murder. Thus we do not decide if it was error not to instruct the jury on manslaughter. Regarding criminal negligence, the Superior Court determined that a jury could not

reasonably conclude that Virdin "fail{ed} to perceive" a risk of death to Stefanie.[42] We need not review the superior Court's determination on this question.

The elements of manslaughter and criminally negligent homicide[43] must find some modicum of support in the record to rise to the level of what a rational jury would credit. This is not a case like *Capano v. State*, where there was clearly no rational basis for any instruction on lesser-included offenses.[44] But we need not decide this issue because any error in not giving instructions on the lesser included offenses of manslaughter and criminally negligent homicide is harmless. This issue is moot because the jury opted for a verdict of first-degree murder and there by rejected the option of

second-degree murder, which is a more serious crime than manslaughter or criminally negligent homicide.

Because the jury rejected second-degree murder and, in convicting Virdin of first-degree murder, it made factual determination that he intentionally killed Stefanie, that finding makes it unnecessary for us to make a decision on the other lesser included. Therefore, even assuming that it was error not to give the additional lesser-included instructions, the issue is moot and any error was harmless.[45]

Evidence Issue

Dr. Caplan, the State's expert, gave testimony explaining the manner in which Stefanie's pregnancy contributed to her death.[46] He testified that when a pregnant woman lies on her back she has less oxygen in her blood, and also that the fetus causes elevation of the diaphragm, making it more difficult to breathe.

Dr. Caplan opined that these were "factors which.... contributed to the death."

In furtherance of Dr. Caplan's testimony, the State introduced a photograph of Stefanie's unclothed corpse lying on its back, and three textbook diagrams depicting the womb of a

pregnant woman and a full-term fetus. With respect to the photograph, Virdin objected that it was highly prejudicial and unnecessary to display to the jury a photograph in which the corpse was naked. The State argued that the photograph would show the jury "the degree to which the pregnancy extends," The trail court conducted the balancing required by D.R.E. 403[47] and admitted the photograph into evidence.

Similarly, with respect to the diagrams, Virdin objected that they were highly prejudicial because they each depicted a full-term fetus with such details as fingers and toes, and eyes and ears- as Virdin puts it, "a little person." Virdin argues that these details were irrelevant to the expert testimony given by Dr. Caplan regarding the cause of death and cumulative of other evidence regarding Stefanie's pregnancy. The trial court ruled that "the size and weight of the fetus is clearly relevant to the mechanism of death as testified to by the doctor" and found that the probative value outweighed the danger of unfair prejudice. The trial court gave a contemporaneous limiting instruction.[48]

We conclude that the admission of these exhibits was not an abuse of discretion.[49]

The exhibits were relevant to the issue of how Stefanie died, which the parties agree was disputed at trial.

Caplan gave an extended explanation of how pregnancy affects breathing and may have contributed to Stefanie's death. Notwithstanding that the photograph showed the victim's naked corpse instead of a clothed corpse, the trial court could properly conclude that the photograph was admissible, applying the balancing test of Rule 403.[30] Similarly, the trial court could properly have concluded that the diagrams were admissible, even though they showed a fully developed fetus with certain human attributes. As the State argued during the prayer conference, the likelihood of prejudice is diminished because the jury had already heard that Stefanie was nine months pregnant, and had been given a baby shower and created a nursery. Moreover, as noted above, the trial court gave a limiting instruction that was appropriate to the circumstances of this case.[31]

Conclusion

We find no reversible error and affirm the judgment of the Superior Court.

[1] The jury found by a vote of 11 to 1 that the mitigating circumstances found to exist outweighed the aggravating circumstances. *See* 11 *Del. C.* § 4209(c)(3). The trial judge sentenced Virdin to life imprisonment without the benefit of probation, parole or other reduction.

[2] The Superior Court found that Mrs. Yun and Stefanie had a "close relationship" and "constantly communicated and prepared for the due date of September 21, 1998, and the care of the baby after the birth."

[3] Stefanie had given Mrs. Yun the keys about a month earlier so that once Stefanie had given birth Mrs. Yun could enter by herself without Stefanie having to walk down a flight of stairs to let her in. Mrs. Yun had not used the keys before this occasion.

[4] Sergeant Timmons testified that he accompanied Mrs. Yun in order to "keep the peace". At the station, Mrs. Yun told Timmons that "she felt James was getting high" and that "he wasn't answering her, wouldn't look at her [and] just made her feel uneasy."

[5] Virdin returned to the apartment in the afternoon and relocked the bedroom door that Timmons had jimmied open earlier that day.

[6] The videotape was played for the jury at trial. Virdin did not testify. Virdin's statement is the only direct account of the murder.

[7] Graham testified that he saw a "red mark around" Stefanie's neck. An expert for the State testified at trial that the cause of death was asphyxiation and that Stefanie's pregnancy contributed to her death because the fetus puts pressure on the inferior vena cava, lowering blood circulation as well as the amount of oxygen that is in the blood. The expert explained that it "takes actually more work for a pregnant woman, especially one who is near term, to take a breath than one who is not pregnant....."

[8] The primary evidence Virdin moved to suppress is the victim's body. Virdin also contends that other evidence should have been suppressed, including his statement to the police and evidence seized from his automobiles.

[9] See seward v. State, Del. Supr., 723 A.2d 365, 370 (1999).

[10] See Jones v. State, Del. Supr., 745 A.2d 856, 860 (1999)

[11] Downs v. State, Del. Supr., 570 A.2 1142, 1144 (1990).

[12] See Walter V. United States, 100 S. Ct. 2395, 2401 (1980) (citing Coolidge v. New Hampshire, 91 S. Ct. 2022, 2048-2050 (1971)); United States v. Shahid, 7th Cir., 117 f. 3d 322, 325 (1997) (citations omitted); United States v. Kinney, 4th Cir., 953 f.2d 863, 865-66 (1992). This analysis applies to the Delaware Constitution as well.

[13] Coolidge, 91 S. Ct. at 2049; see Richards v. State, Del. Supr., 77 A.2d 199, 204 (1950) (adopting the exclusionary rule because "[t]he most effective way to protect the guarantees against unreasonable search and seizure and compulsory self-incrimination is to exclude from evidence any matter obtained by a violation of them")

[14] Id;Shahid, 117 F. 3d at 325.

[15] United States v. Feffer, 7th Cir., 831 F.2d 734, 737 (1987).

[16] CF. United States v. Jacobsen, 104 S. Ct. 1652, (1984) ("The additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search.") (citing Walter v. United States, 100 S. Ct. 2395, 2402 (1980)); Kinney 953 f.2d at 865 (rejecting argument that "the presence of the police transformed the nature of the search from a private search to a governmental search" and that the officers ' participation "exceeded the scope of the initial private search")

[17] United States v. Shahid 7th Cir., 117 F.3d 322, 325 (1997) (citations and quotations omitted); see also United States v.

Cleveland, 9th Cir., 38 F.3d 1092, 1093 (1995) ("In determining whether a private party's search implicates the Fourth Amendment, the relevant inquiry is: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends.")

[18] Shahid, 117 F.3d at 325; see also United States v. Koenig, 7th Cir., 856 f.3 843, 848 n.1(1988) (noting that the agency analysis in the Fourth Amendment context shares the same "highly factual nature" as the common law agency analysis).

[19] Shahid, 117 F. 3d at 325. The defendant also has the burden of establishing government involvement in a private search. See Cleaveland, 38 F. 3d at 1093.

[20] Transcript (TR.) of 9/21/99, at 3 (Bench ruling).

[21] Cf. United States v. Feffer, 7th Cir., 831 F.2d 734, 739 (1987) Holding that a numbered IRS informant had not been a state agent when she turned over her employer's tax returns to the IRS, because she had "an independent motivation" and "would have continued her search regardless of the [IRS] agent's involvement.").

[22] Timmons testified, "[Tina] indicated that she was going to send Mike up and to just check the apartment again. I informed her at that point, so we don't have any problems, to make sure that he come to the department and have Corporal Graham…have him go with him." Even if the Yuns would not have gone back without police presence, this establishes only that they were concerned about their safety, not that they were acting in concert with the police. Although Timmons told the Yuns the contact Graham if they went, it was up to the Yuns weather to go back.

[23] Virdin relies on the case of State v. Kahoonei, Haw. Supr., 925 P.294, 301 (1996), holding that a person's "subjective motivation" for searching is irrelevant to whether she is an agent for the police. This holding makes sense to the extent that it recognizes that through improper police conduct such as improper manipulation a private individual may become an unwitting tool of the

government. In that circumstance, present in Kahoonei but not in this case, reliance on "subjective motivation" to characterize a search would be misguided. Here, however, the Yuns' search for their daughter preceded any police involvement, and it was the Yuns who were responsible for getting the police involved in the first instance.

[24] Tr. Of 9/21/99, at 11 (Bench ruling).

[25] Id. at 10

[26] for example, Timmons stated that he "accompanied her there to make sure we didn't have a domestic" and that he walked through the apartment looking for Virdin. He also stated that we "checked the apartment for her daughter." Graham testified that he and the Yuns "would just go check the apartment, basically, just to check the wale fare, as a public assist, to make sure she's okay." He explained that he looked into the bathroom into the apartment "checking " for Stefanie.

[27] Cf. Walter v. United States, 100 S. Ct. 2395, 2402 (1980) ("The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search.").

[28] See id. (holding that "the Government may not exceed the scope of the private search unless is has the right to make an independent search")

[29] In this connection, the trial court found that under the circumstances Tina Yun had implied authority to enter the apartment and search for Stefanie under the circumstances. We agree that in this case there was nothing improper about the officers' willingness to allow the Yuns to search through the apartment and enter the locked bedroom.

[30] We do not reach the State's alternative argument that if a search occurred it was validly consented to by the Yuns.

[31] Tr. Of 9/21/99, at 11-12 (Bench ruling).

[32] See Seward v. State, Del. Supr., 723 A.2d 365, 370 (1999).

[33] See Moran v. Burbine, 106 S. Ct. 1135, 1140-41 (1986); Howard v. State, Del. Supr., 458 A. 2d 1180, 1183 (1983).

[34] Howard, 458 A.2d at 1183; see also id. (noting that examination must be made of the "totality of the circumstances including the behavior of the interrogators, the conduct of the defendant, his age, his intellect, his experience, and all other pertinent factors'") (citation omitted).

[35] Id. (citations omitted).

[36] Traylor v. State, Del. Supr., 458 A.2d 1170, 1176, (1983). Virdin was asked, "Do you understand what we're talking to you about?" and "Do you understand the answers that you're giving us?" He answered "Yes" to each question. See Howard, 483 A.2d at 1183

[37] See id.

[38] See also Zebroski v. State, Del. Supr., 715 A.2d 75 (1998).

[39] Virdin said in his statement that he and his wife were arguing and that he was telling her, "just don't hit me. I don't like for you to hit me." He then "just lost all control," and he "realized what [he] had done after [he] stood up." Virdin offered expert testimony from Dr. Barbara Wolf that Stefanie died not as a result of manual strangulation but from asphyxiation caused by the combination of her pregnant condition, Virdin sitting on top of her, and being positioned on her back. Virdin also offered expert testimony that Stefanie may have quickly lost consciousness due to a carotid sinus reflex" resulting from pressure on her neck. Virdin's counsel argued that these less straightforward causes of death relative to manual strangulation were not perceived by Virdin.

[40] Compare 11 Del. C. § 635 with 11 Del. D. § 632.

[41] Delaware Criminal Code with Commentary 191 (1973).

[42] See 11 Del. C. § 231 (d) defining criminal negligence).

[43] Virdin sought a manslaughter instruction under three categories of manslaughter. See 11 del. C. § 632 (1) (any person who "reckless causes the death of another person"); 11 Del. C. § 632 (2) (any person who "'[w]ith intent to cause serious physical injury to another person the person causes the death of such person, employing means which would to a personable person . . . seem likely to cause death"); 11 Del. C. § 632(3) (any person who "intentionally causes the death of another person under circumstances which do not constitute murder because the person acts under the influence of extreme emotional disturbance") Virdin also sought a criminally negligent homicide instruction. See 11 Del. C. § 631 (any person who "with criminal negligence, [] causes the death of another person")

[44] See Capano v. State, Del. Supr., *A.2d*_,Nos. 110 and 149, 1999. Veasey, C.J., Slip op. at 104-20 (Aug. 10 2001).

[45] See Zebroski v. State, Del. Supr., 715 A.2d 75, 82 (1998); Lilly v. State, Del. Supr., 649 A.2 1055, 1062-63(1994).

[46] During a side bar conference counsel for Virdin agreed that this issue was in dispute.

[47] Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of issues.

[48] The jury was instructed that "the exhibits which have just been introduced for the limited purpose of assisting you in understanding the witness' testimony as to cause of death. You many consider them for that purpose only and no other.

[49] *See Lynch v. State*, Del. Supr., 588 A.2d 1138, 1141 (1991) ("[T]he determination of whether the probative value of a particular piece of evidence is substantially outweighed by the danger of unfair prejudice is a matter which falls particularly within the discretion of the trial judge, who has the first-hand opportunity to evaluate relevant factors.") (citing *Williams v. State,* Del. Supr., 494 A.2 1237, 1241 (1985)).

[50] Delaware Rule of Evidence (D.R.E.) 403. *See Keperling v. State*, Del. Supr., 699 A.2d 317, 319 (1997) ("The fact that a photograph of the victim may be gruesome or unpleasant doe not render it inadmissible."); cf. *Casalvera v. State*, 410 A.2d 1369, 1373 (1980) (noting that a prosecutor is not "required to select [] the least dramatic means of presenting his evidence").

[51] *See Keperling*, 669 A.2 at 320. In *Keperling*, we state that "the manner in which the Superior Court evaluated and ruled upon the use of the photographic slides was a model of proper procedure". Virdin argues that *Keperling* is distinguishable because in this case there was no vior dire of the expert to determine the relevancy of the exhibits, and the limiting instruction in this case was perfunctory relative to the one given in *Keperling*. WE have considered these factors in determining that the trial court did not abuse its discretion.

No._____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2001

James W. Virdin, Petitioner

v.

State of Delaware, Respondent

PROOF OF SERVICE

I, James E. Liguori, attorney for petitioner, do declare that on this 10th day of December, 2001, as required by Supreme Court Rule 29, I have served the preceding Petition for Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by hand delivery on December 10, 2001.

The name and address of the party served is as follows:

John Williams, Esquire
Deputy Attorney General
Department of Justice
102 W. Water Street
Dover, DE 19901

I declare under penalty of perjury that the foregoing is true and correct.

JAMES E. LIGUORI
Attorney for Petitioner